RECORD AND BRIEFS

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No. 16-498

In the Supreme Court of the United States

DAVID PATCHAK, PETITIONER

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

The Secretary of the Interior (Secretary) took a parcel of land into trust for an Indian tribe, and petitioner challenged that decision under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* While his suit was pending in the district court, Congress enacted legislation that reaffirmed the trust status of the land, ratified and confirmed the Secretary's decision to take the land into trust, and provided that "[n]otwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land [at issue in this case] shall not be filed or maintained in a Federal court and shall be promptly dismissed." Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2(b), 128 Stat. 1913. The district court dismissed petitioner's suit, and the court of appeals affirmed. The question presented is:

Whether Congress may prohibit actions related to this particular parcel of land from being filed or maintained in the federal courts, and order that pending cases meeting that standard be dismissed, without intruding on the role of the judiciary under constitutional separation-of-powers principles.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 24-45) is reported at 828 F.3d 995. The opinion of the district court (J.A. 50-71) is reported at 109 F. Supp. 3d 152.

JURISDICTION

The judgment of the court of appeals (J.A. 46-47) was entered on July 15, 2016. The petition for a writ of certiorari was filed on October 11, 2016, and was granted on May 1, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are reprinted in an appendix to this brief. App, *infra*, 1a-3a.

STATEMENT

1. The Indian Reorganization Act (IRA), 25 U.S.C. 5101 *et seq.*,[1] was enacted to enable Indian tribes "to assume a greater degree of self-government, both politically and economically." *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). In furtherance of that statutory purpose, Section 5 of the IRA authorizes the Secretary of the Interior (Secretary) to acquire lands in the name of the United States and hold those lands in trust for an Indian tribe or individual Indian. 25 U.S.C. 5108. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, known as the Gun Lake Tribe (the Tribe), is a federally-recognized Indian tribe residing in southwestern Michigan. See 63 Fed. Reg. 56,936 (Oct. 23, 1998). In 2005, in response to an application from the Tribe, the Department of the Interior announced that it would take into trust for the Tribe a 147-acre parcel of land (the Bradley Property) in the township of Wayland, Michigan. See 70 Fed. Reg. 25,596 (May 13, 2005); see also J.A. 26. The Tribe intended to use the land for gaming in compliance with the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, and it built a casino there, which has been in operation since 2011. J.A. 26.

2. In 2008, petitioner, a non-Indian who lives near the Bradley Property, filed suit in federal district court to challenge the Secretary's land-into-trust decision under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* J.A. 27. The United States had taken title to the land in 2009, J.A. 54-55, after the conclusion of an earlier suit, filed in 2005 by a different plaintiff, which unsuccessfully challenged the Secretary's authority to

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[1] In 2016, Title 25 of the United States Code was reclassified, and the provisions of the IRA were renumbered.

take the land into trust, see *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23, 26-28, 30-33 (D.C. Cir. 2008) (per curiam), cert. denied, 555 U.S. 1137 (2009). Shortly after the United States took title to the Bradley Property, this Court held in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), that Section 5 of the IRA, 25 U.S.C. 5108, authorizes the Secretary to take land into trust for an Indian tribe under the first definition of "Indian" in the IRA, see 25 U.S.C. 5129 ("members of any recognized Indian tribe now under Federal jurisdiction"), only if the tribe was "under Federal jurisdiction" when the IRA was enacted in 1934. 555 U.S. at 382 (citation omitted). Petitioner alleged that the Secretary's decision to take the Bradley Property into trust exceeded the authority provided by Congress because, in petitioner's view, the Tribe was not under federal jurisdiction in 1934. J.A. 55. Petitioner alleged injuries from expected increases in traffic and property taxes, as well as "an irreversible change in the rural character of the area" and a "weakening of the family atmosphere of the community." 646 F. Supp. 2d at 75 n.5; see J.A. 27.[2]

3. a. The district court held that petitioner's alleged injuries were not within the zone of interests protected by Section 5 of the IRA and dismissed petitioner's suit for lack of prudential standing. 646 F. Supp. 2d at 76-79. The court also expressed reservations about its jurisdiction over the case given that the Secretary had already taken the land into trust. *Id.* at 78 n.12. The court noted that the waiver of sovereign immunity in the Quiet Title Act, 28 U.S.C. 2409a, which applies to suits to adjudicate disputed title to real property in which the United States claims an interest, expressly does not

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[2] Petitioner's complaint did not raise any constitutional challenges to the Secretary's decision to take the land into trust. J.A. 27.

waive the United States' sovereign immunity for suits disputing the United States' title to trust or restricted Indian lands. 646 F. Supp. 2d at 78 n.12; see 28 U.S.C. 2409a(a). Having dismissed petitioner's suit for lack of standing, however, the court declined to rule on that issue. 646 F. Supp. 2d at 79 n.12.

b. The court of appeals reversed. 632 F.3d at 712. The court concluded that petitioner had standing to challenge the Secretary's decision, *id.* at 704-707, and it rejected the Secretary's and the Tribe's alternative argument that sovereign immunity barred the suit by virtue of the Quiet Title Act, *id.* at 707-712.

c. This Court affirmed the court of appeals' decision. 567 U.S. at 212, 228 (*Patchak I*). The Court held that the federal government was not immune from the suit by virtue of the Quiet Title Act. *Id.* at 215-224. The Court explained that the APA generally waives the federal government's immunity from a suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." *Id.* at 215 (quoting 5 U.S.C. 702).

The APA's waiver of sovereign immunity, the Court noted, "comes with an important carve-out"—it does not apply "'if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought' by the plaintiff." 567 U.S. at 215 (quoting 5 U.S.C. 702). But the Court held that the Quiet Title Act is not such a statute. *Id.* at 215-224. The Court explained that the Quiet Title Act waives the government's sovereign immunity from "a suit by a plaintiff asserting a 'right, title, or interest' in real property that conflicts with a 'right, title, or interest' the United States claims." *Id.* at 215 (quoting 28 U.S.C. 2409a(d)). Because petitioner

did not claim any right, title, or interest of his own in the Bradley Property, the Court concluded that his suit was not a quiet-title action, and the Quiet Title Act's exception to the waiver of sovereign immunity for actions to quiet title to "trust or restricted Indian lands," 28 U.S.C. 2409a(a), therefore did not bar petitioner's suit under the APA. 567 U.S. at 215-221. The Court concluded that petitioner's challenge to the Secretary's authority to take the Bradley Property into trust is "a garden-variety APA claim" subject to that statute's waiver of sovereign immunity. *Id.* at 220.

The Court acknowledged the concern of the federal government and the Tribe that allowing suits such as petitioner's to proceed would pose significant barriers to Indian tribes' ability to promote investment and economic development on lands taken into trust by the Secretary. 567 U.S. at 223. The Court stated that that argument was "not without force, but it must be addressed to Congress." *Ibid.* The Court explained that in the Quiet Title Act, "Congress made a judgment about how far to allow quiet title suits" and chose not to waive sovereign immunity for actions seeking to quiet title to trust or restricted Indian lands. *Ibid.* The Court observed that "[p]erhaps Congress would—perhaps Congress should—make the identical judgment for the full range of lawsuits pertaining to the Government's ownership of land," such as petitioner's suit challenging the legality of the Secretary's decision to take the land into trust for the Tribe. *Id.* at 224. That decision, the Court concluded, belongs to Congress. *Ibid.*

The Court further held that the interests asserted by petitioner were arguably within the zone of interests protected by Section 5 of the IRA and that he therefore had prudential standing under the APA to challenge the

Secretary's land-into-trust decision. 567 U.S. at 224-228. Because he had standing, and because Congress had waived the United States' sovereign immunity for petitioner's APA claim, this Court held that petitioner's "suit may proceed," *id.* at 212, and it remanded for further proceedings, *id.* at 228.

4. Following the remand, petitioner waited for more than two years before proceeding in the district court. J.A. 18. During that time, Congress held hearings on the economic uncertainty that this time-consuming litigation imposed on the Tribe,[3] and in 2014 it enacted the Gun Lake Trust Land Reaffirmation Act (Gun Lake Act or Act), Pub. L. No. 113-179, 128 Stat. 1913. In relevant part, the Gun Lake Act provides:

> (a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

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[3] See *S. 1603, S. 1818, S. 2040, S. 2041, and S. 2188: Hearing Before the Senate Comm. on Indian Affairs*, 113th Cong., 2d Sess. (2014); 160 Cong. Rec. H7485 (daily ed. Sept. 15, 2014) (House consideration of bill); 160 Cong. Rec. H7577-H7578 (daily ed. Sept. 16, 2014) (House consideration and passage of bill).

§ 2, 128 Stat. 1913.

When Congress was considering the Gun Lake Act, it was uncertain whether the Tribe was "under federal jurisdiction" when the IRA was enacted in 1934, and thus whether the Secretary was authorized, under the Court's interpretation of the IRA in *Carcieri*, to take land into trust for the Tribe. H.R. Rep. No. 590, 113th Cong., 2d Sess. 2 (2014) (House Report). And more broadly, the House Report explained that there was "no consensus in Congress on how to address" *Carcieri*, and that in the meantime, "consideration of bills to take specific lands in trust * * * is the appropriate means of resolving trust land matters." *Id.* at 2-3. With respect to the Bradley Property, the House Report expressed concern that without the legislation, "the continued operation of the Gun Lake Tribe casino will be placed in jeopardy." *Id.* at 1. The Senate Report similarly explained that the Gun Lake Act would "provide certainty to the legal status of the land, on which the Tribe has begun gaming operations as a means of economic development for its community." S. Rep. No. 194, 113th Cong., 2d Sess. 2 (2014) (Senate Report). Congress therefore acted to eliminate any doubt as to the legality of the Secretary's decision or the trust status of the Bradley Property by "reaffirm[ing]" the trust status of the land and by "ratif[ying] and confirm[ing]" the actions of the Secretary. Gun Lake Act § 2(a), 128 Stat. 1913.[4]

Having eliminated any doubt about the trust status of the land, Congress further provided in the Gun Lake

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[4] The Secretary also issued a contemporaneous decision evaluating the historical evidence and concluding that the Tribe was "under federal jurisdiction" in 1934. J.A. 75-159. The Secretary therefore concluded that Section 5 of the IRA authorized the Secretary to take land into trust for the Tribe. J.A. 142-147.

Act that any action relating to the Bradley Property "shall not be filed or maintained in a Federal court and shall be promptly dismissed." § 2(b), 128 Stat. 1913.

5. Following enactment of the Gun Lake Act, the district court dismissed petitioner's suit. J.A. 50-71. The court explained that the "clear intent" of Congress was "to moot this litigation" and that, barring some constitutional infirmity in the Gun Lake Act itself, the court lacked jurisdiction over the case. J.A. 59.

a. The district court rejected petitioner's argument that Section 2(b) of the Gun Lake Act violated separation-of-powers principles under Article III of the Constitution. J.A. 60-65. The court acknowledged that in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court declined to give effect to a statute that "prescribe[d] [a] rule[] of decision" to the judiciary in a pending case. J.A. 61 (first set of brackets in original) (quoting *Klein*, 80 U.S. (13 Wall.) at 146). The district court explained, however, that this Court's subsequent cases "have clarified that the Constitution is not offended when Congress amends substantive federal law, even if doing so affects pending litigation." J.A. 61-62 (citing *Miller* v. *French*, 530 U.S. 327, 348-350 (2000); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). "[F]ederal statutes do not run afoul of *Klein*," the district court explained, "as long as they refrain from 'direct[ing] any particular findings of fact or applications of law, old or new, to fact.'" J.A. 62 (second set of brackets in original) (quoting *Robertson*, 503 U.S. at 438).

The district court concluded that Section 2(b) of the Gun Lake Act did not violate separation-of-powers principles under this Court's cases. J.A. 62-63. The district

court explained that the Gun Lake Act "does not mandate a particular finding of fact or application of law to fact," but instead "withdraws this Court's jurisdiction to make any substantive findings whatsoever." J.A. 63. "This," the district court concluded, "Congress most assuredly can do." *Ibid.*

b. The district court further rejected petitioner's contention that Section 2(a) of the Gun Lake Act, which "reaffirmed" the Bradley Property as trust land and "ratified and confirmed" the Secretary's action taking that land into trust, violates separation-of-powers principles by superimposing Congress's own interpretation of the IRA without amending the statute. 128 Stat. 1913; see J.A. 64-65. The court explained that Section 2(a) did not instruct any court to ratify the Secretary's action or compel any findings of fact or applications of law. J.A. 65. Although "Congress lent its imprimatur to the Secretary's decision," it "stopped short of requiring the judiciary to do the same." *Ibid.*[5]

6. The court of appeals affirmed, J.A. 24-45, holding that Section 2(b) of the Gun Lake Act did not encroach upon the judicial power in violation of separation-of-powers principles, J.A. 31-35. The court rejected petitioner's argument that Congress may only affect the outcome of pending litigation by "directly amend[ing]

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[5] Petitioner raised a number of additional constitutional challenges to the Gun Lake Act, all of which the district court rejected. J.A. 66-71 (rejecting petitioner's arguments that Section 2(b) of the Act (i) burdens his First Amendment right to petition the government, (ii) violates his Fifth Amendment due process rights; and (iii) constitutes an unlawful bill of attainder that sought to punish petitioner individually in violation of Article I, Section 9 of the Constitution). The court of appeals affirmed the district court's rulings on those issues, J.A. 35-43, and petitioner has not renewed them in this Court.

the substantive laws upon which the suit is based." J.A. 32. The court observed that this Court has rejected constitutional challenges to new legislation that "compelled changes in law" without directly amending the underlying statute. J.A. 33 (quoting *Robertson*, 503 U.S. at 438); see J.A. 32-34 (citing *Robertson*, 503 U.S. at 436-437, 440, and *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1318, 1325-1326 (2016)). Here, the court of appeals continued, "[t]hrough its ratification and confirmation of the Department of the Interior's decision to take the Bradley Property into trust, expressed in Section 2(a), and its clear withdrawal of subject matter jurisdiction in Section 2(b), the Gun Lake Act has 'changed the law.'" J.A. 34 (quoting *Bank Markazi*, 136 S. Ct. at 1326). The court further explained that, "[m]ore to the point, Section 2(b) provides a new legal standard [the court is] obliged to apply: if an action relates to the Bradley Property, it must promptly be dismissed." J.A. 34-35. The court concluded that "subject matter jurisdiction over [petitioner's] claim has thus validly been withdrawn." J.A. 43.

The court of appeals noted that the government had advanced an alternative ground on which the court could rule—that the Gun Lake Act "provides an exemption to the APA's waiver of sovereign immunity." J.A. 43. Because the court concluded that the Gun Lake Act validly withdrew subject-matter jurisdiction over petitioner's claim, the court declined to consider that alternative grounds for affirmance. *Ibid.*

SUMMARY OF ARGUMENT

A. Under Article III of the Constitution, Congress has the power to ordain and establish inferior federal courts and to define the jurisdiction of those courts.

That power includes the authority to withdraw jurisdiction previously given and to subject pending cases to the new jurisdictional limitation. If jurisdiction is withdrawn without a savings clause, all pending cases must fall. Section 2(b) of the Gun Lake Act, which provides that any action relating to the Bradley Property, including a pending action, "shall not be filed or maintained in a Federal court and shall be promptly dismissed," 128 Stat. 1913, eliminates the competence of federal courts to adjudicate a particular category of cases and thereby limits the subject-matter jurisdiction of the federal courts. This Court has stated that Congress need not use "magic words" to clearly state a jurisdictional rule, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013), and the Court has previously concluded that statutory provisions similar to Section 2(b) of the Gun Lake Act stated a jurisdictional limitation. When Congress provides that an action "shall not be filed or maintained in a Federal court," it is not defining the ingredients of a claim for relief or establishing a claims-processing rule. Rather, Section 2(b) is a flat prohibition on filing or maintaining any action relating to the Bradley Property in the federal courts.

B. Similarly, Section 2(b) of the Gun Lake Act precludes judicial review of petitioner's APA claim because the statute restores sovereign immunity previously waived by Congress in the APA for actions relating to the Bradley Property. The United States, having given its consent in the APA for agency officials to be sued, may withdraw that consent at any time, and it has done so for actions relating to the Bradley Property. Congress has specified in the APA itself that its provisions for judicial review do not apply where other statutes "preclude judicial review," 5 U.S.C. 701(a)(1), and that

the APA's waiver of sovereign immunity does not "affect[] other limitations on judicial review," 5 U.S.C. 702. The result is that cases relating to the Bradley Property, including petitioner's APA suit, must be dismissed.

C. Section 2(b) of the Gun Lake Act does not offend any separation-of-powers principle recognized by this Court. It is well-established that Congress may enact a statute that changes the law applicable to pending cases. This Court has routinely applied changes in the governing law to pending cases, and that principle applies equally to cases withdrawing the jurisdiction of the federal courts over certain cases or restoring the United States' sovereign immunity with respect to those cases. The Court held in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), that Congress cannot require courts to apply a new law predicated on a determination that Congress is powerless to make. *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1324 (2016). But Section 2(b) of the Gun Lake Act does not do that. It creates a new law for the courts to apply: an action that relates to the Bradley Property may not be filed or maintained in federal court. And that change in the law falls squarely within Congress's authority to withdraw its grant of jurisdiction to the federal courts and to withdraw its waiver of the sovereign immunity of the United States in those courts. Nor does the requirement that an action relating to the Bradley Property "shall be promptly dismissed" leave the courts without any adjudicatory function to perform. Gun Lake Act § 2(b), 128 Stat. 1913. Dismissal is the natural and mandatory consequence of the courts' determination that the action relates to the Bradley Property and thus cannot be maintained in federal court.

This Court's conclusion in *Patchak I*—that petitioner's suit "may proceed"—was made in the context of the Court's conclusion that petitioner had prudential standing and that Congress at that time had waived the United States' immunity from petitioner's suit under the APA. 567 U.S. at 212. That conclusion does not entitle petitioner to litigate the merits of his APA challenge now. Congress's subsequent enactment of the Gun Lake Act amended the law applicable to petitioner's claim by eliminating federal-court jurisdiction over a category of cases that includes petitioner's suit and by withdrawing the United States' waiver of sovereign immunity for that category of cases.

ARGUMENT

SECTION 2(b) OF THE GUN LAKE ACT IS A VALID EXERCISE OF CONGRESS'S AUTHORITY TO DEFINE THE JURISDICTION OF THE FEDERAL COURTS AND TO RESTORE THE SOVEREIGN IMMUNITY OF THE UNITED STATES

The Gun Lake Act was enacted by Congress to resolve a long-running dispute regarding the decision of the Secretary to take the Bradley Property into trust for the Tribe. The Act was intended to eliminate any doubt regarding the trust status of the land, on which the Tribe has operated a casino since 2011, J.A. 26, and to free that land from pending or future litigation that could continue or reignite that uncertainty. The Gun Lake Act contains two operative provisions to accomplish those ends.

The first provision, Section 2(a), is not directly at issue here. Section 2(a) of the Act "reaffirm[s]" that the Bradley Property is trust land and states that the actions of the Secretary in taking the land into trust "are

ratified and confirmed." 128 Stat. 1913. Under the Indian Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, and other provisions of the Constitution, Congress has "plenary power to legislate in the field of Indian affairs." *United States* v. *Lara*, 541 U.S. 193, 200 (2004) (quoting *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989)). Although Congress has vested authority in the Secretary to take land into trust under the IRA, "the primary responsibility for choosing land to be taken in trust still lies with Congress." *Confederated Tribes of Siletz Indians* v. *United States*, 110 F.3d 688, 698 (9th Cir.), cert. denied, 522 U.S. 1027 (1997).

To the extent there was uncertainty about the Secretary's authority to take the property into trust, Congress could ratify the Secretary's action and establish the land's trust status even if the Secretary's prior action was unauthorized. "It is well settled that Congress may * * * ratify . . . acts which it might have authorized, and give the force of law to official action unauthorized when taken." *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 301-302 (1937) (internal citation and internal quotation marks omitted); see *United States* v. *Heinszen & Co.*, 206 U.S. 370, 382 (1907) ("That where an agent, without precedent authority, has exercised in the name of a principal a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity * * * , is so elementary as to need but statement."). And "irrespective of any doctrine of ratification," Congress may establish retroactively by legislation that an action of a governmental official is "confirmed and approved" to be within that official's powers. *Swayne & Hoyt*, 300 U.S. at 302. The

Gun Lake Act both "ratified and confirmed" the Secretary's decision, and thereby established that the Secretary's action was authorized and the Bradley Property is properly held in trust. § 2(a), 128 Stat. 1913. Petitioner briefly asserts (Br. 19) that Section 2(a) of the Gun Lake Act did not actually place the Bradley Property into trust. But he does not ask this Court to interpret that provision.

The second provision is directly at issue here. Section 2(b) of the Gun Lake Act further protects the Bradley Property from present and future uncertainty by eliminating the threat of present and future litigation relating to the property, which had been the source of the uncertainty for a number of years. Section 2(b) prohibits any action relating to the Bradley Property from being filed or maintained in federal court. 128 Stat. 1913. That provision was well within Congress's power to enact, both as an exercise of Congress's authority to define the jurisdiction of the federal courts and as an exercise of its authority to provide for the sovereign immunity of the federal government from suit. And in enacting Section 2(b), Congress did not violate any separation-of-powers principle recognized by this Court. It acted permissibly to change the law applicable to pending cases rather than attempting to direct the result in petitioner's case under existing law.

A. Section 2(b) Eliminates The Jurisdiction Of The Federal Courts To Hear Any Action Relating To The Bradley Property

1. Congress can withdraw jurisdiction over pending suits

Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in

one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. Included in Congress's broader power to ordain and establish inferior federal courts is the power "to define and limit the jurisdiction of" those courts. *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, 330 (1938). As this Court long ago explained, the "Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it." *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Only the jurisdiction of this Court "is derived directly from the Constitution," *ibid.*, and its appellate jurisdiction is conferred "with such Exceptions, and under such Regulations as the Congress shall make," U.S. Const. Art. III, § 2, Cl. 2.

The power of Congress to define and limit the jurisdiction of the inferior federal courts includes the authority to withdraw jurisdiction previously given and to subject pending cases to the new jurisdictional limitation. As the Court has explained, jurisdiction that has been conferred "may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall." *Kline*, 260 U.S. at 234. This Court has repeatedly applied that basic principle. See, *e.g.*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) (noting that the Court has "regularly" applied intervening jurisdictional limitations to pending cases); *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) (noting that the Court has "consistently" adhered to the rule that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law"); *Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870) ("Jurisdiction * * * was conferred by an

act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress.").[6]

In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), for example, a federal district court denied a petition for a writ of habeas corpus under a statute granting federal courts jurisdiction over such petitions, and the prisoner appealed to this Court pursuant to a statutory grant of appellate jurisdiction. See *id.* at 515. Congress, however, repealed the appellate-jurisdiction provision before the Court issued a decision. *Id.* at 512-514. The Court held that Congress had acted within its power under Article III, which expressly includes "the power to make exceptions to the appellate jurisdiction of this [C]ourt." *Id.* at 514. The Court stated that when its jurisdiction "ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ibid.*

Similarly, in *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541 (1867), an insurance company incorporated in Massachusetts brought suit in federal court against Massachusetts tax collectors under a statute that granted federal courts jurisdiction over suits between citizens of the same State "for causes arising under the revenue

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[6] In *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), the Court held that although the withdrawal of jurisdiction in the Detainee Treatment Act of 2005, Pub. L. No. 109-145, Div. A, Tit. X, 119 Stat. 2739, did not contain a savings clause, there were nonetheless sufficient indications of congressional intent not to withdraw jurisdiction over pending cases. 548 U.S. at 572-584. There are no such indications here, and indeed Section 2(b) of the Gun Lake Act expressly applies to pending cases.

laws." *Id.* at 543; see *id.* at 542. While the suit was pending, Congress repealed the jurisdictional provision without any clause that would save pending cases. *Id.* at 543. "It is clear," the Court explained, "that when the jurisdiction of a cause depends upon a statute[,] the repeal of the statute takes away the jurisdiction," and the Court therefore dismissed the case for lack of jurisdiction. *Id.* at 544; see *id.* at 545.

2. Section 2(b) withdraws jurisdiction over pending suits relating to the Bradley Property

a. Section 2(b) of the Gun Lake Act similarly withdraws the jurisdiction of the federal courts, and its application to this case pending at the time of its enactment is constitutional under this Court's longstanding precedent. Congress's withdrawal of federal-court jurisdiction to review actions relating to the Bradley Property falls squarely within Congress's recognized authority to "give, withhold or restrict [federal-court] jurisdiction at its discretion." *Kline*, 260 U.S. at 234.

It makes no difference to the validity of Section 2(b) of the Gun Lake Act that Congress withdrew jurisdiction over a pending case, thereby requiring the dismissal of petitioner's suit after this Court concluded in *Patchak I* that the "suit may proceed" under the jurisdictional regime and waiver of the United States' sovereign immunity as they existed at the time. 567 U.S. at 212. When jurisdiction previously conferred is withdrawn without saving pending cases, "all pending cases though cognizable when commenced must fall." *Kline*, 260 U.S. at 234. Here, while petitioner's APA claim was pending before the district court on remand from this Court, and before entry of any final judgment on the merits of petitioner's claim, Congress eliminated the ju-

risdiction of the federal courts to hear any action relating to the Bradley Property. And it provided that an action relating to the Bradley Property—expressly including any then-"pending" actions—"shall not be filed *or maintained*" in federal court, and any such actions "shall be promptly dismissed." Gun Lake Act § 2(b), 128 Stat. 1913 (emphasis added). Section 2(b) of the Gun Lake Act thus is a valid exercise of Congress's power to define and limit the jurisdiction of the federal courts.

b. Petitioner contends (Br. 23) that Section 2(b) of the Gun Lake Act does not limit the jurisdiction of federal courts because it "does not state (clearly or otherwise) that it is jurisdictional." Petitioner's argument rests (*ibid.*) on the observation that "the word 'jurisdiction' does not appear anywhere in [the Gun Lake Act's] title, headings or text." That argument should be rejected.

i. Subject-matter jurisdiction describes "a court's competence to adjudicate a particular category of cases." *Wachovia Bank, N.A.* v. *Schmidt*, 546 U.S. 303, 316 (2006). Section 2(b) of the Gun Lake Act provides that any action relating to the Bradley Property, expressly including an action pending as of the date of enactment, "shall not be filed or maintained in a Federal court and shall be promptly dismissed." 128 Stat. 1913. The statute thus eliminates the "competence [of federal courts] to adjudicate a particular category of cases," *i.e.*, cases relating to the Bradley Property, and thereby limits the subject-matter jurisdiction of the federal courts. *Wachovia Bank*, 546 U.S. at 316.

Congress need not "incant magic words" in order to have clearly stated that a rule is jurisdictional. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). In

assessing whether a statutory provision is jurisdictional, this Court considers "context, including this Court's interpretation of similar provisions in many years past." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 168 (2010); see *Auburn Reg'l Med. Ctr.*, 568 U.S. at 153-154. This Court has previously concluded that a provision worded similarly to Section 2(b) of the Gun Lake Act stated a jurisdictional limitation. In *Keene Corp.* v. *United States*, 508 U.S. 200 (1993), the Court considered language in 28 U.S.C. 1500, which provides that the Court of Federal Claims "shall not have jurisdiction" over a claim for which the plaintiff has a suit pending in another court. *Ibid.*; see 508 U.S. at 202. The immediate predecessor to Section 1500 contained language similar to Section 2(b) of the Gun Lake Act. It provided that "[n]o person shall file or prosecute in the Court of Claims" any claim for which he has a suit pending in another court. Judicial Code, ch. 231, § 154, 36 Stat. 1138; see *Keene Corp.*, 508 U.S. at 208. The Court concluded that the revision was a "change 'in phraseology'" that did not "work[] a change in the underlying substantive law," and that both versions of the statute "bar jurisdiction over the claim of a plaintiff who, upon filing, has an action pending in any other court" for the same claim. *Keene Corp.*, 508 U.S. at 209 (citation omitted).

If legislation providing that "[n]o person shall file or prosecute" a claim in federal court in particular circumstances is synonymous with legislation providing that courts "shall not have jurisdiction" over such a claim, as this Court held in *Keene Corp.*, then so too is the Gun Lake Act's direction that claims relating to the Bradley Property "shall not be filed or maintained" in federal court.

Similarly, in *Gonzalez* v. *Thaler*, 565 U.S. 134 (2012), the Court stated that the statutory directive that "an appeal may not be taken to the court of appeals" without a certificate of appealability, 28 U.S.C. 2253(c)(1), is "clear jurisdictional language" establishing that federal appellate courts "lack jurisdiction to rule on the merits of appeals from habeas petitioners" until a certificate has been issued. 565 U.S. at 142 (citation and internal quotation marks omitted). That "clear[ly] jurisdictional language," *i.e.*, that "an appeal may not be taken," is the appellate-court equivalent of the language in Section 2(b) of the Gun Lake Act providing that actions relating to the Bradley Property "shall not be filed or maintained" in federal court, 128 Stat. 1913.

ii. The cases on which petitioner relies discuss statutory provisions unlike Section 2(b) of the Gun Lake Act and do not support petitioner's contention that Congress was required to use the term "jurisdiction" in order to redefine and limit the jurisdiction of the federal courts. See Pet. Br. 22-23 (citing *Auburn Reg'l Med. Ctr.*, 568 U.S. at 153, and *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515-516 (2006)).

In *Arbaugh*, the Court addressed "two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief." 546 U.S. at 503. In defining what type of "employer" could be sued for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, Congress limited the definition to include only those employers with "fifteen or more employees." *Arbaugh*, 546 U.S. at 503 (quoting 42 U.S.C. 2000e(b)). The Court held that a plaintiff must establish that the defendant had 15 employees as a necessary factual prerequisite to stating a

claim, but the requirement was not "jurisdictional." *Id.* at 513-516.

The Court reasoned that courts have "an independent obligation to determine whether subject-matter jurisdiction exists," but "[n]othing in the text of Title VII indicates that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met." *Arbaugh*, 546 U.S. at 514. The Court further reasoned that although Congress could have made the 15-employee requirement jurisdictional, just as it has made an amount-in-controversy a threshold requirement of diversity jurisdiction under 28 U.S.C. 1332, the 15-employee threshold "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Arbaugh*, 546 U.S. at 515 (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)); see *id.* at 514-515.

In contrast to the Title VII provision in *Arbaugh*, Section 2(b) of the Gun Lake Act does not establish any factual prerequisites or legal requirements for stating a claim challenging the Secretary's decision to take land into trust for an Indian tribe (or for any other claim). Instead, it precludes all actions in federal court relating to the Bradley Property entirely and requires that any pending actions be dismissed. Gun Lake Act § 2(b), 128 Stat. 1913. If Congress had instead stated that "the federal courts shall not have jurisdiction over any action relating to" the Bradley Property, the consequences for petitioner's suit would be identical to those under Section 2(b) as written.

Auburn Regional Medical Center, the other case on which petitioner relies (Br. 32), also addressed a statutory requirement not analogous to Section 2(b). In that case, the Court considered whether a statutory 180-day

time limit for filing administrative appeals challenging certain Medicare reimbursement decisions was "jurisdictional," and held that it was not. *Auburn Reg'l Med. Ctr.*, 568 U.S. at 149. The provision allowed the agency to grant an extension of time upon a showing of good cause, and did not contain mandatory terminology, providing only that parties complying with the 180-day time limit "may obtain a hearing." *Id.* at 154 (quoting 42 U.S.C. 1395*oo*(a)(3)). "Key" to the Court's decision was a long line of cases holding that "filing deadlines ordinarily are not jurisdictional" but rather are "quintessential claim-processing rules." *Ibid.* (citation omitted).

Section 2(b) of the Gun Lake Act contains none of those features. It applies to federal courts, not an administrative agency; it is mandatory (suits "*shall* not be filed or maintained"); it contains no exceptions of any kind; and it is not a time limit or other claims-processing rule. 128 Stat. 1913 (emphasis added); see *Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011) (claims-processing rules are rules that require the parties to "take certain procedural steps at certain specified times"). Section 2(b) is an all-encompassing prohibition on filing or maintaining any action relating to the Bradley Property in federal court. The provision falls squarely within this Court's precedent acknowledging Congress's authority to define the jurisdiction of the inferior federal courts.

B. Section 2(b) Withdraws The United States' General Waiver Of Sovereign Immunity In The Administrative Procedure Act For Any Action Relating To The Bradley Property

Even if petitioner were correct that Section 2(b) of the Gun Lake Act is not a jurisdictional provision, the provision still precludes judicial review of petitioner's

challenge to the Secretary's decision to take the Bradley Property into trust. In barring actions relating to the Bradley Property from the federal courts, Congress could rely not only on its Article III authority over the jurisdiction of the inferior federal courts, but also on its authority to legislate concerning the sovereign immunity of the United States.

1. The court of appeals decided this case on the ground that Section 2(b) of the Gun Lake Act eliminates the jurisdiction of the federal courts over actions relating to the Bradley Property and does so without violating any separation-of-powers principle recognized by this Court. J.A. 31-35. The government additionally argued in the court of appeals that Section 2(b) of the Gun Lake Act precludes judicial review of petitioner's APA claim because, for actions relating to the Bradley Property, the statute restores sovereign immunity previously waived by Congress in the APA, and there is no other applicable waiver that would permit this suit against agency officials to proceed. Gov't C.A. Br. 19-22. The court declined to address that argument, having concluded that the Gun Lake Act validly withdraws subject-matter jurisdiction over petitioner's claim. J.A. 43. The argument nevertheless provides an alternative ground on which to affirm the court's decision.

"It is elementary that 'the United States, as sovereign, is immune from suit save as it consents to be sued.'" *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (brackets omitted) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)); see *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). The United States' consent to suit is a "prerequisite for jurisdiction" in the federal courts,

United States v. *Mitchell*, 463 U.S. 206, 212 (1983), and "the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit," *Meyer*, 510 U.S. at 475 (brackets in original) (quoting *Sherwood*, 312 U.S. at 586) (internal quotation marks omitted).

Furthermore, the United States, having given its consent to be sued, may "withdraw the consent at any time." *Lynch* v. *United States*, 292 U.S. 571, 581 (1934); see *Hans* v. *Louisiana*, 134 U.S. 1, 17 (1890) (sovereign may withdraw its consent "whenever it may suppose that justice to the public requires it"). The power to withdraw consent is not diminished when litigation is pending against the government. In *District of Columbia* v. *Eslin*, 183 U.S. 62 (1901), for example, claimants had obtained a judgment against the District of Columbia under a statute that waived sovereign immunity for suits against the District under public works contracts and made judgments payable by the United States. *Id.* at 63-64. While an appeal was pending, Congress repealed that authorization and provided that "all proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid." *Id.* at 64 (citation and emphasis omitted). This Court dismissed the case for lack of jurisdiction and explained that "[i]t was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under th[e] act." *Id.* at 65; see *id.* at 66. The Court concluded that, under the "power that the court is allowed to exercise under th[e] act," it could not enter any order requiring the Secretary of the Treasury to pay the judgment. *Id.* at 66.

2. In this case, petitioner filed suit against the Secretary pursuant to the general waiver of sovereign immunity in the APA. See 567 U.S. at 215, 220-221. The APA authorizes a person who is "adversely affected or aggrieved by agency action within the meaning of a relevant statute" to bring an action in federal court against "an agency or an officer or employee thereof," and it provides that such an action "shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. 702. As the Court explained in *Patchak I*, however, the waiver of sovereign immunity provided in the APA "comes with an important carve-out," 567 U.S. at 215—it does not apply, the Court noted, "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," *ibid.* (quoting 5 U.S.C. 702). The APA also does not apply where other "statutes preclude judicial review," 5 U.S.C. 701(a)(1), and the APA's waiver of immunity does not "affect[] other limitations on judicial review," 5 U.S.C. 702.

In *Patchak I*, the Court concluded that the Quiet Title Act, which waives sovereign immunity for quiet-title actions (but not for suits to quiet title to trust or restricted Indian lands), 28 U.S.C. 2409a, did not trigger the first carve-out from the APA quoted above because petitioner did not assert a right, title, or interest in the Bradley Property and his suit therefore was not a quiet-title action. 567 U.S. at 215-221. The Court acknowledged that it might make sense for Congress to reinstate the United States' sovereign immunity for other types of suits challenging the government's ownership of land, but "that is for Congress to tell [the Court], not for [the Court] to tell Congress." *Id.* at 224.

Congress did precisely that with respect to the Bradley Property. After this case was remanded to the district court, Congress passed the Gun Lake Act and provided that, "[n]otwithstanding any other provision of law, an action * * * relating to the [Bradley Property]," including any pending action, "shall not be filed or maintained in a Federal court and shall be promptly dismissed." § 2(b), 128 Stat. 1913. Accordingly, "[n]otwithstanding [the APA]," which waives the government's sovereign immunity by stating that a suit brought by a person aggrieved by agency action "shall not be dismissed * * * on the ground that it is against the United States," 5 U.S.C. 702, Congress specified that no action relating to the Bradley Property may be filed or maintained in federal court and shall be dismissed, Gun Lake Act § 2(b), 128 Stat. 1913; see House Report 2 (describing Section 2(b) of the Gun Lake Act as a "broad grant of immunity from lawsuits pertaining to the Bradley Property"). Section 2(b) of the Gun Lake Act is a statute that "preclude[s] judicial review," 5 U.S.C. 701(a)(1), and the APA's waiver of sovereign immunity therefore does not apply, see also 5 U.S.C. 702 (APA's waiver of sovereign immunity does not "affect[] other limitations on judicial review."). The result is that cases relating to the Bradley Property, including petitioner's case, must be dismissed.

C. Section 2(b) Does Not Offend Constitutional Separation-Of-Powers Principles

Congress's authority to define and limit the jurisdiction of the federal courts is broad, but not unlimited. Congress has authority to "give, withhold or restrict [federal-court] jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." *Kline*, 260 U.S. at 234. In *Bank Markazi*

v. *Peterson*, 136 S. Ct. 1310 (2016), the Court described three general limitations imposed by separation-of-powers principles on Congress's exercise of its legislative authority. Congress cannot usurp a court's power to interpret and apply the law to the circumstances before it, for "[t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule." *Id.* at 1323 (brackets in original) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Congress cannot vest review of the decisions of Article III courts in the Executive Branch. *Ibid.* (citing *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)). And Congress may not undo a final judgment of a federal court or command a federal court to reopen a final judgment. *Ibid.* (citing *Plaut*, 514 U.S. at 219).[7]

Petitioner contends (Br. 12) that Section 2(b) of the Gun Lake Act intrudes on the judicial power because it directs that cases relating to the Bradley Property must be dismissed, after this Court concluded that peti-

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[7] In *Bank Markazi*, the Court also identified other specific constitutional provisions that constrain Congress's authority to affect pending cases by changing the law. Those limitations include the prohibitions on singling out persons for punishment, U.S. Const. Art. I, § 9, Cl. 3 (prohibiting ex post facto laws and bills of attainder); taking property without just compensation, U.S. Amend. V (Just Compensation Clause); and arbitrarily applying a statute retroactively in a manner that does not comport with due process, U.S. Const. Amend. V (Due Process Clause). See *Bank Markazi*, 136 S. Ct. at 1324-1325; see also *e.g.*, *Boumediene* v. *Bush*, 553 U.S. 723, 792 (2008) (statute that withdrew federal jurisdiction to hear certain habeas corpus actions, including cases pending at the time of enactment, unlawfully suspended the writ of habeas corpus in violation of the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2). No issue arising under any of those provisions is at issue in this Court. See note 5, *supra*.

tioner's case may proceed, without a change in the underlying law. That contention is incorrect. Section 2(b) of the Gun Lake Act does change the law applicable to petitioner's claim by providing that any action relating to the Bradley Property may not be filed or maintained in federal court. Upon a court's conclusion that an action relates to the Bradley Property, the statute forecloses federal-court jurisdiction over the action and federal-court review of the Secretary's decision, and the action shall be promptly dismissed. Section 2(b) does not offend any separation-of-powers principle recognized by this Court.

1. Article III permits Congress to change the law applicable to a pending case

This Court has made clear that Congress has the authority to change the law applicable to pending cases. In *Bank Markazi*, the Court recognized that under a narrow exception to Congress's legislative authority based on separation-of-powers principles, Congress cannot direct the result in a pending case under existing law. 136 S. Ct. at 1324. Even before *Bank Markazi*, this Court's cases had drawn a distinction between statutes that change the law applicable to pending cases and statutes that attempt to direct a particular result without changing the applicable law. The Court had also made clear that Congress may amend the law in a way that makes the outcome of a pending case virtually certain so long as it leaves courts with some adjudicatory function to perform, and that Congress may legislate to affect one or a very small number of cases.

a. It is well established that Congress may enact a statute that changes the law applicable to pending cases. As Chief Justice Marshall explained in *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801),

"if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *Id.* at 110; see *Plaut*, 514 U.S. at 226. This Court therefore routinely applies changes in governing law to pending cases. See, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438-439 (1992); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 391-395 (1980) (*Sioux Nation*); *Schooner Peggy*, 5 U.S. (1 Cranch) at 110. That principle applies equally to cases withdrawing the jurisdiction of the federal courts over certain cases or restoring the United States' sovereign immunity with respect to those cases. See pp. 16-18, 25, *supra*.

Congress's alteration of the governing law, without more, does not invade the courts' judicial function under Article III. While a court "must apply" a law made applicable to a pending case, the court retains authority to construe the statute, to apply it to the facts before it, to make any necessary factual determinations, and to enter judgment for one party or the other. *Plaut*, 514 U.S. at 226; see *Robertson*, 503 U.S. at 438-439; *Pope* v. *United States*, 323 U.S. 1, 10-11 (1944).

b. While Article III permits Congress to alter the law governing a pending case, this Court held in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), that Congress invaded the judicial function when it instead purported to direct a particular result in a pending case. *Id.* at 146-147. *Klein* arose out of litigation brought by cotton claimants after the Civil War, under a statute that permitted them to recover the cost of any property seized from them and sold during wartime. Act of Mar. 3, 1863 (1863 Act), ch. 120, § 3, 12 Stat. 820; see *Klein*, 80 U.S. (13 Wall.) at 136-139. The statute required the

claimants to "pro[ve] to the satisfaction of [the Court of Claims]" that they had "never given any aid or comfort to the present rebellion." 1863 Act § 3, 12 Stat. 820. In 1863, President Lincoln issued a presidential pardon to any person who participated in the rebellion who later swore an oath of loyalty to the United States. *Bank Markazi*, 136 S. Ct. at 1323 (citing Proclamation No. 11, 13 Stat. 737). In *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870), this Court held that the pardon provided "a complete substitute for proof that [the recipient] gave no aid or comfort to the rebellion," and the recipient was therefore eligible for compensation from the Court of Claims. *Id.* at 543.

Some members of Congress balked at the idea of allowing formerly rebellious southerners to recover from the United States Treasury by swearing a loyalty oath after the fact. Amanda L. Tyler, *The Story of* Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts, in Federal Courts Stories* 88-92 (Vicki C. Jackson & Judith Resnik eds., 2010). One recipient of such a pardon was a successful southern merchant whose estate administrator was the claimant in *Klein*. After Klein received a substantial judgment from the Court of Claims, Congress enacted legislation requiring the courts to consider receipt of a presidential pardon as proof of a claimant's *disloyalty*. Act of July 12, 1870 (1870 Act), ch. 251, 16 Stat. 235.

The statute provided in relevant part that "no pardon or amnesty granted by the President * * * shall be admissible in evidence on the part of any claimant in the court of claims as evidence in support of any claim against the United States." 1870 Act, 16 Stat. 235. Furthermore, the statute provided that acceptance of a pardon "shall be taken and deemed * * * in the * * * court

of claims, and on appeal therefrom, conclusive evidence that such person did take part in and give aid and comfort to the late rebellion, and did not maintain true allegiance or consistently adhere to the United States." *Ibid.* Upon proof that a pardon had been accepted, Congress provided that "the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant." *Ibid.* For cases on appeal, where judgment had been rendered in the Court of Claims in favor of a claimant based on a pardon, "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." *Ibid.*

This Court held that the statute "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (13 Wall.) at 147. The precise basis for the holding in *Klein* is unclear, and in *Bank Markazi*, the Court noted that *Klein* has been called "a deeply puzzling decision." *Bank Markazi*, 136 S. Ct. at 1323 (citation omitted). The Court explained, however, that *Klein* does not inhibit Congress from amending applicable law. *Ibid.* And it described *Klein* itself as holding that Congress, having no authority itself to impair the effect of a pardon issued by the Executive, could not "direc[t] [a] court to be instrumental to that end." *Id.* at 1324 (brackets in original) (quoting *Klein*, 80 U.S. (13 Wall.) at 148). The Court thus explained in *Bank Markazi* that "the statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon —standards Congress was powerless to prescribe." *Ibid.*

c. Before *Bank Markazi*, other decisions of this Court had similarly explained that *Klein* applies only when Congress enacts a statute that directs a particular result without changing the law. In *Robertson*, the Court upheld legislation that was enacted "[i]n response to" litigation challenging certain government timber-harvesting plans under various environmental statutes, and that "replaced" the standards set forth in those statutes. 503 U.S. at 433, 437. In sustaining the legislation, the Court reasoned that Congress permissibly altered the governing standards and did not either direct "findings or results under old law" or "instruct the courts whether any particular timber sales would violate" the new standards. *Id.* at 438-439. Thus, "[w]hatever the precise scope of *Klein* * * * , later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218 (second set of brackets in original) (quoting *Robertson*, 503 U.S. at 441); see *Miller* v. *French*, 530 U.S. 327, 349 (2000) (same).

Nor does *Klein* prevent Congress from amending the law in a manner that makes a particular outcome virtually certain, so long as Congress does not "prescrib[e] a rule of decision that le[aves] the court no adjudicatory function to perform." *Sioux Nation*, 448 U.S. at 392; see, *e.g.*, *Klein*, 80 U.S. (13 Wall.) at 146-147. In *Robertson*, the statute replaced the governing legal standards with a legislative compromise that permitted harvesting in all but certain designated areas. 503 U.S. at 434-435. The Court upheld the statute because it did not "instruct the courts" whether any particular actions violated the new standards. *Id.* at 439.

Article III likewise does not prohibit Congress from legislating, as it did in Section 2(b), to affect only "one

or a very small number of specific subjects." *Bank Markazi*, 136 S. Ct. at 1328 (citing, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 158-161 (1974); *Pope*, 323 U.S. at 9-14; *The Clinton Bridge*, 77 U.S. (10 Wall.) 454, 462-463 (1870); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430-432 (1856)). The Court explained in *Bank Markazi* that although Congress frequently enacts generally applicable legislation, "that is by no means their only legitimate mode of action." *Id.* at 1327 (quoting *Plaut*, 514 U.S. at 239 n.9).

2. Section 2(b) changes the law applicable to petitioner's case

As described above, see pp. 18-23, 26-27, *supra*, Section 2(b) of the Gun Lake Act changes the law governing petitioner's claim by prohibiting claims relating to the Bradley Property from being filed or maintained in federal court, thereby eliminating the "competence [of federal courts] to adjudicate [that] particular category of cases." *Wachovia Bank*, 546 U.S. at 316. As the court of appeals correctly recognized, Section 2(b) "provides a new legal standard [for courts] * * * to apply: if an action relates to the Bradley Property," it cannot be maintained in federal court and "must promptly be dismissed." J.A. 34-35.

a. Petitioner is thus wrong to suggest (Br. 12, 16-18, 23) that Section 2(b) of the Gun Lake Act directs courts to dismiss pending cases "without amending underlying substantive or procedural laws." To support his contention, petitioner points to statements in the House and Senate Reports that the Gun Lake Act made no "changes in existing law." Br. 19-20 (citing Senate Report 4; House Report 5). That language was included in the

Senate Report pursuant to Rule XXVI(12) of the Standing Rules of the Senate, which requires the committee to provide a side-by-side comparison of any legislation that "repeal[s] or amend[s] any statute or part thereof." Standing R. of the S. XXVI(12) (2013); see Senate Report 4. Similar language was included in the House Report for the same reason under applicable House rules. R. of the H.R. XIII(3) (2013); see House Report 5. That language in the committee reports merely indicates that enactment of the Gun Lake Act did not require the actual amendment of any already-existing statute. It obviously does not refute the operation of the Gun Lake Act's text, which changed the law applicable to petitioner's suit through a stand-alone and tract-specific ratification of the Secretary's taking of the Bradley Property into trust and withdrawal of the federal courts' authority to entertain a suit concerning that property.

b. Petitioner suggests (Br. 11), however, that Congress violated the separation of powers because it ordered the courts to dismiss actions relating to the Bradley Property "without amending any generally applicable statute."[8] This Court has never imposed such a requirement. In *Robertson*, the Court rejected the argument that Congress "did not modify old requirements" when it enacted "an entirely separate statute" instead of amending an existing law. 503 U.S. at 439-440. The Court explained that this distinction made no difference

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[8] In the court of appeals, petitioner argued that Congress was required to amend either the IRA or the APA. Pet. C.A. Br. 22-29. Before this Court, however, petitioner states (Br. 11) that Congress may not direct that a case be dismissed "without any modification of generally applicable substantive or procedural laws," without specifically identifying those laws.

because "each formulation would have produced an identical task for a court adjudicating the * * * claims." *Id.* at 440; see *Bank Markazi*, 136 S. Ct. at 1318 (noting that statute at issue was "[e]nacted as a freestanding measure, not as an amendment" to existing law). Regardless of whether Congress enacts an entirely new statute or amends existing law, courts must give effect to either type of enactment as a duly-enacted law.

3. Section 2(b) does not direct a particular outcome under existing law

Section 2(b) of the Gun Lake Act does not run afoul of the rule announced in *Klein* because it does not "direct any particular findings of fact or applications of law, old or new, to fact." *Robertson*, 503 U.S. at 438; see *Bank Markazi*, 136 S. Ct. at 1323 (Congress cannot "usurp a court's power to interpret and apply the law to the circumstances before it.") (brackets and citation omitted). It creates new law for the courts to apply: an action that relates to the Bradley Property may not be filed or maintained in federal court.

a. Petitioner contends (Br. 16, 24-25) that the Gun Lake Act violates separation-of-powers principles because, similar to the statute in *Klein*, it "direct[s]" courts to dismiss pending cases. As petitioner points out (*ibid.*), certain language in Section 2(b) of the Gun Lake Act—the statement that an action relating to the Bradley Property "shall not be filed or maintained" in federal court and "shall be promptly dismissed," 128 Stat. 1913—is similar to the portions of the statute in *Klein* providing that (i) upon proof that a pardon had been accepted, "the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant," 1870 Act, 16 Stat. 235; see Pet. Br. 16; and (ii) that in cases on appeal where judgment had

been rendered in favor of a claimant based on a pardon, this Court "shall * * * have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction," 1870 Act, 16 Stat. 235; see Pet. Br. 24-25. It was not that quoted language in the statute in *Klein*, however, that was problematic. It was, rather, the *basis* on which jurisdiction was withdrawn that led the Court to strike down the provision.

Indeed, the Court explained that, "[u]ndoubtedly the legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions." *Klein*, 80 U.S. (13 Wall.) at 145. The Court therefore acknowledged that "if th[e] act did nothing more, * * * [i]f it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make such exceptions from the appellate jurisdiction as should seem to it expedient," and "it would be [the Court's] duty to give [the law] effect." *Ibid.* (internal quotation marks omitted). The problem with the statutory denials of jurisdiction to this Court and the Court of Claims, the Court explained, was that those provisions required the courts to first "ascertain the existence of certain facts," which in turn required application of Congress's "arbitrary rule of decision" that a pardon must be construed as evidence of disloyalty. *Id.* at 146. In other words, it was the predicate for the dismissal for lack of jurisdiction—the alteration of the effect of a pardon that Congress had no power to make—that rendered the statute unconstitutional. See *Bank Markazi*, 136 S. Ct. at 1324.

Unlike the statute in *Klein*, the change in the law that Section 2(b) of the Gun Lake Act enacted did not

rest on a predicate determination that Congress was without authority to make. Congress clearly has authority to withdraw its grant of jurisdiction to the federal courts and its waiver of the sovereign immunity of the United States in those courts with respect to a particular subject matter—here, the Bradley Property. And in deciding whether Section 2(b) applies, the federal courts are "left to apply [their] ordinary rules to the new circumstances created by the act." *Klein*, 80 U.S. (13 Wall.) at 147. If the court concludes that the action relates to the Bradley Property, the action cannot be filed or maintained in federal court. If it does not, the suit may proceed.

Petitioner's amici contend that Section 2(b) "commands [courts] to take a specific action" (*i.e.*, dismissal), and thereby commands a particular result "without any room for judicial construction *other than* the threshold determination that the case at bar" relates to the Bradley Property. Fed. Courts Scholars Amicus Br. 20 (emphasis added). But this Court explained in *Bank Markazi* that "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." 136 S. Ct. at 1325. It makes no difference that the factual findings the court is called upon to make under the new legal standard may be "uncontested or incontestable," such as the fact that the property to which petitioner's action relates is the Bradley Property. *Ibid.* (quoting *Pope*, 323 U.S. at 11). Whether "the facts be ascertained by proof or by stipulation, it is still a part of the judicial function to determine whether" a case relates to the Bradley Property and, if so, to dismiss it. *Pope*, 323 U.S. at 11-12.

b. Petitioner and his amici focus on the last phrase of Section 2(b) of the Gun Lake Act, which provides that

any pending action relating to the Bradley Property "shall be promptly dismissed." 128 Stat. 1913; see Pet. Br. 17-18; see also Fed. Courts Scholars Amicus Br. 20-21 (arguing that even if the first clause of Section 2(b) is constitutional because it turns on a judicial determination that an action relates to the Bradley Property, the second clause is unconstitutional because it directs courts to dismiss the action). But the requirement that an action relating to the Bradley Property "shall be promptly dismissed" is the natural and indeed mandatory consequence of the court's determination that the action relates to the Bradley Property and thus cannot be filed or maintained in federal court. See *Ex parte McCardle*, 74 U.S. (7 Wall.) at 514 (when jurisdiction is eliminated, "the only function remaining to the court is that of announcing the fact and dismissing the cause"); see also *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 865 (2009) (When "[foreign sovereign] immunity kicked back in[,] * * * the cases ought to have been dismissed, 'the only function remaining to the court [being] that of announcing the fact and dismissing the cause.'") (third set of brackets in original) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) at 514); *Osbornes*, 76 U.S. (9 Wall.) at 575 ("[W]here a court has no jurisdiction of the case the correct practice is to dismiss the suit."). The requirement that a court dismiss an action relating to the Bradley Property after concluding that it lacks jurisdiction over the action thus does not require the court to do anything it is not already required to do based on the exercise of its judicial power to interpret the law and apply the law to the facts before it. See *Klein*, 80 U.S. (13 Wall.) at 145 (stating that if the statute had "simply denied the right of appeal in a particular class of cases," "it would be [the Court's] duty to give [the law] effect").

c. Finally, petitioner suggests (Br. 17) that Section 2(b) of the Gun Lake Act resembles the hypothetical statute, posited in the Chief Justice's dissenting opinion in *Bank Markazi*, directing that "Smith wins" the pending case of *Smith* v. *Jones*. See *Bank Markazi*, 136 S. Ct. at 1334-1335. According to petitioner, Section 2(b) dictates that the government wins by ordering actions relating to the Bradley Property to be dismissed. Petitioner is incorrect.

This Court's cases indicate that *Klein* does not prevent Congress from amending the law in a manner that makes a particular outcome virtually certain, so long as Congress does not "prescrib[e] a rule of decision that le[aves] the court no adjudicatory function to perform." *Sioux Nation*, 448 U.S. at 392; see, *e.g.*, *Klein*, 80 U.S. (13 Wall.) at 146-147; see p. 33, *supra*. And in any event, Section 2(b) of the Gun Lake Act is "outcome-altering," *Bank Markazi*, 136 S. Ct. at 1325, in a very different way than the hypothetical statute declaring that "Smith wins." The Chief Justice posited, and the entire Court agreed, that a statute simply decreeing that "Smith wins" a pending case would unconstitutionally encroach on the judiciary's power to decide cases on the merits. *Id.* at 1326; see *id.* at 1334-1335 (Roberts, C.J., dissenting). In that scenario, Smith receives a judgment from the court that awards relief. The decision whether to award relief is traditionally vested exclusively in the judiciary. *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011). In the Chief Justice's hypothetical, that power had been usurped by Congress. The Gun Lake Act, however, ensures that *no* party receives a judgment on the merits. Instead, it establishes at the threshold that the court lacks jurisdiction over the controversy and cannot issue a judgment on the merits or grant relief to anyone.

Congress supplies the applicable law (there is no jurisdiction over the action if it relates to the Bradley Property), and the courts apply that law. Those are precisely the roles assigned to each Branch under the Constitution's separation of powers. See *Plaut*, 514 U.S. at 222-223.

4. *This Court's prior statement in* Patchak I *that petitioner's suit "may proceed" does not entitle petitioner to a judgment on the merits notwithstanding the Gun Lake Act*

Petitioner repeatedly alludes (Br. i, 5, 18, 20, 28) to this Court's statement in *Patchak I* that his suit "may proceed," 567 U.S. at 212, and he implies that Congress cannot enact legislation under which his suit may not proceed without infringing on this Court's decision. The Court's conclusion that petitioner's case "may proceed," however, was made in the context of the Court's conclusion that petitioner had standing and that Congress had waived the United States' immunity to suit under the APA. *Ibid.* Congress's subsequent enactment of the Gun Lake Act amended the law applicable to petitioner's claim and provides that actions relating to the Bradley Property may not proceed in federal court. The statute, moreover, is not constitutionally suspect simply because it affects only one tract of land. This Court has made clear that the Constitution permits Congress to take actions that affect only a single subject or individual. See pp. 33-34, *supra*.

Under separation-of-powers principles, Congress may not "retroactively comman[d] the federal courts to reopen final judgments." *Bank Markazi*, 136 S. Ct. at 1323 (brackets in original) (quoting *Plaut*, 514 U.S. at

219).[9] But this Court's conclusion that petitioner's suit "may proceed" after resolution of threshold standing and immunity questions was not a final judgment, 567 U.S. at 212, and the Court's statement at that interlocutory stage therefore did not diminish the power of Congress to eliminate jurisdiction over a category of cases that includes petitioner's suit. Adherence to Congress's exercise of its authority to define or limit the jurisdiction of the federal courts does not offend separation-of-powers principles; it respects them. *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845). Just as this Court has the "province and duty * * * to say what the law is" in particular cases and controversies, *Marbury*, 5 U.S. (1 Cranch) at 137, Congress possesses the exclusive power to create inferior federal courts and to "invest[] them with jurisdiction either limited, concurrent, or exclusive, and [to] withhold[] jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good," *Cary*, 44 U.S. (3 How.) at 245. As this Court has recognized, "[t]o deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely." *Ibid.*

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[9] *Plaut* did not involve a statute that altered the prospective effect of an injunction. See 514 U.S. at 232.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913, provides:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Gun Lake Trust Land Reaffirmation Act".

SEC. 2. REAFFIRMATION OF INDIAN TRUST LAND.

(a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

(b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

(c) RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

Approved Sept. 26, 2014.

2. 5 U.S.C. 701 provides:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chap-

ter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

3. 5 U.S.C. 702 provides:

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.